IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1667 OF 2006

Shri Atul Sunderji Dadhia
Aged 47 years, 41/43,
Ratanshi Kunj
Building Samuel Street,
V.V.Chandan Rd,
Mumbai-400 003. .. Petitioner.
(Friend of detenu)

Vs

1. The State of Maharashtra,
through the Addl. Chief Secretary,
to the Government of Maharashtra
(Home), Mantralaya,
Mumbai -400 032.

2. Ms.Chandra Iyengar,
The Principal Secretary (Appeal
and Security), Govt. of Maharashtra,
Home Department and
Detaining Authority,

3. The Superintendent of Mumbai,
Central Prison, Arthur Road,
Mumbai.

4. The Superintendent of
Nasik Road, Central Prison,
Nasik. .. Respondents.

Mrs A.M.Z.Ansari, for the petitioner.

Mr.D.S.Mhaispurkar, APP for the respondents.

CORAM : SMT.RANJANA DESAI & D.B.BHOSALE,JJ.
DATED : 11th APRIL, 2007

ORAL JUDGMENT : (PER D.B.BHOSALE, J.)

1. The order of detention dated 10.7.2006 passed by the Principal Secretary (Appeals and Security),

Government of Maharashtra, Home Department and Detaining Authority, hereinafter referred to as "the Detaining Authority", in exercise of the powers conferred under section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "the COFEPOSA Act") is under challenge in the present writ petition under Article 226 of the Constitution of India. The petition has been filed by one Atul Dadhia, a friend of detenu Jayendra Chandulal Thakkar alias Jitendra Chimanlal Thakkar. The order of detention was made on 10.7.2006. It is based on the grounds of detention dated 10.7.2006, recording that it was necessary to detain the detenu with a view to preventing him in future from smuggling goods.

2. The order of detention and the grounds of detention, both dated 10.7.2006, were served on the detenu on 12.7.2006. The subjective satisfaction, as recorded in the grounds of detention, was mainly founded on the incident of 13/14.03.2006. On this day, the detenu was intercepted at Terminal-2, Chhatrapati Shivaji International Airport, Mumbai, when he was allegedly found smuggling out of India foreign currency equivalent to Indian Rupees 33,06,667.60. His statements were recorded on 14.3.2006 and 28.3.2006 under section 108 of the

Customs Act, 1962. He was shown arrested on 14.3.2006 under section 104 of the said Act. His smuggling activities were found to be falling under section 113(d) and (e) of the Customs Act, punishable under section 135 thereof. Considering the nature and gravity of the offence and well organised manner in which the detenu had engaged in the prejudicial activities, the detaining authority has recorded its satisfaction that unless detained, the detenu is likely to continue to engage in the prejudicial activities in future also and hence passed the impugned order of detention. He was also informed that he has a right to make representation/s to the detaining authority, the State Government, the Central Government and the Advisory Board against the detention order. It is against this backdrop the order of detention is under challenge in the present writ petition before us.

3. We heard Mrs Ansari, learned counsel for the petitioner and Mr.Mhaispurkar, learned APP for the State for quite some time and with their assistance went through the impugned order, the grounds of detention as well as the other material to which our attention was specifically drawn by them. Mrs Ansari, though initially advanced her arguments assailing the impugned order of detention on different grounds,

having realised that we were not with her, ultimately confined her challenge only on the ground no.(ix) in the memo of petition and fairly stated that we need not deal with other grounds. Mr.Mhaispurkar, learned A.P.P. did not oppose this request. In the circumstances we heard Mrs.Ansari on ground no.(ix) in the memo of petition.

4. The ground no.(ix) in the memo of petition reads thus:

> "(ix) The petitioner says and submits that the detenue is filing representation through the prison authorities which will addressed to the detaining authority, the State Government and the Central Government. The Petitioner says and submits on this petition being admitted and Rule Nisi being issued it would be incumbent upon the detaining authority, the State Government and the Central Government to satisfy this Hon'ble Court as to whether the said representation of the detenu was considered by the detaining authority the State Government and the Central Government expeditiously and independently of each other and uninfluenced by the opinion of the Advisory Board and as to whether their replies were communicated to the detenue without any loss of time. The petitioner says and submits that on the failure of the detaining authority, the State Government and the Central Government in so satisfying this Hon'ble Court on the aforesaid counts, the impugned order of detention be held as violative of Article 22(5) of the Constitution".

5. Mrs.Ansari in support of this ground placed reliance upon the following judgments of the Supreme Court: **(i) Mohinuddin Alias Moin Master Vs. District**

Magistrate, Beed and Others 1987 Supreme Court Cases (Cri) 674; (ii) Rama Dhondu Borade Vs. V.K.Saraf AIR 1989 Supreme Court 1861 and (iii) Rajammal Vs. State of T.N. and Anr. (1999) 1 Supreme Court Cases 417. She submitted that the delay at every stage in considering the representation made by the detenu adversely affects his further detention. In other words, it is for the authority concerned to explain the delay, in disposing of the representation and in the present case no satisfactory explanation has been given by the concerned authorities and, therefore, even if initial order of detention is held to be legal, the continued detention pursuant to such order deserves to be quashed and set aside. Our attention was drawn to the facts of the cases in the judgment of the Supreme Court relied upon by her to submit that in those cases in view of the unexplained delay, though short, the Supreme Court set aside the order of detention since the liberty of a citizen guaranteed under Article 21 of the Constitution of India was involved. Our specific attention was drawn to the case of **Rajammal** (supra) where the delay was hardly 5 days and since no justifiable explanation was offered the Supreme Court set aside the order of detention. On the other hand Mr.Mhaispurkar, learned A.P.P. for the State invited our attention to the affidavits filed by the detaining authority and by the Deputy

Commissioner of Customs, the Sponsoring authority, and submitted that the delay has been properly explained by both these authorities and from the explanation offered by them it is clear that the alleged delay was on account of reasons beyond control of the detaining authority. He submitted that the order of detention would not vitiate in view of the explanation offered by the detaining authority as well as the sponsoring authority in their reply affidavits filed in present writ petition. Our attention was also invited to the judgment of **Meena Jayendra Thakur Vs. Union of India (1999) 8 Supreme Court Cases 177** to contend that even if it is assumed that the delay remained unexplained, it would at the most vitiate the continued detention and not the original order of detention.

6. We perused the reply affidavit filed by the detaining authority as well as the sponsoring authority. The detaining authority in its reply affidavit dated 16th November, 2006 in paragraph 13 thereof has explained the delay as follows:

> "13. With reference to para 4(ix) of the petition, it is submitted that the detenu has forwarded his representation dated 7.8.2006 addressed to the Principal Secretary (Appeals & Security) and Detaining Authority and Additional Chief Secretary (Home), Secretary, Ministry of Finance, Government of India, New Delhi and Chairman of Advisory Board, through the Superintendent, Thane Central Prison, Thane, which were received in the department

> on 7.8.2006. The parawise comments on the representation were called from the Sponsoring Authority on 10.8.2006 which were forwarded by the Sponsoring Authority vide letter dated 28.8.2006 and received in the desk on 29.8.2006. The concerned Assistant prepared a note on 31.8.2006 and submitted the file. The Under Secretary gave his endorsement on 8.9.2006 and forwarded file to the Deputy Secretary. It is submitted that during the said period there were holidays on 3.9.2006 and 6.9.2006. The Deputy Secretary gave his endorsement on 11.9.2006 and forwarded the file to me on 12.9.2006. The said representation was carefully and independently considered by me on 19.9.2006 and was rejected. It is submitted that during the said period there was holiday on 17.9.2006. It is submitted that during the said period, I was held up in the hearing of ten externment appeals. Thereafter files were sent to the Desk on 20.9.2006 and the rejection reply was prepared and issued on 22.9.2006 which was served upon the detenu in Nashik Road Central Prison on 25.9.2006".

7. The Sponsoring authority in paragraph 11 of the reply affidavit dated 10th November, 2006 has explained the delay in the following manner:

> "11. With reference to para 4(ix) of the petition, I state that in respect of the representation dated 7.8.2006 addressed to the Principal Secretary (Appeals & Security) and Detaining Authority and Additional Chief Secretary (Home), Secretary, Ministry of Finance, Government of India, New Delhi and Chairman of Advisory Board, the parawise comments were called from the Sponsoring Authority vide letter dated 10.8.2006. The said letter was received by the Sponsoring Authority on 16.8.2006. It is submitted that during the period 12th, 13th and 15th August, 2006 were holidays. Thereafter, the Sponsoring Authority prepared the parawise remarks and forwarded the same vide letter dated 28.8.2006. It is submitted that during the said period there were holidays on 19th, 20th, 26th and 27th August, 2006".

8. It is apparent that at every stage there was delay on the part of the concerned Authorities. The detenu made his representations on 7.8.2006 to the detaining authority, the Secretary of Ministry of Finance, Government of India, New Delhi and the Chairman of the Advisory Board, through the Superintendent of the Prison. The representations were received by the department on 7.8.2006. The parawise comments of the sponsoring authority were invited on 10.8.2006, to which the sponsoring authority responded to on 28.8.2006. This 18 days delay has been explained by the sponsoring authority stating that the letter dated 7.8.2006 was received by it on 16.8.2006 and between 7.8.2006 and 16.8.2006, there were holidays on 12th, 13th and 15th August, 2006. Even thereafter, the sponsoring authority took 12 days time to prepare its parawise remarks and forward them vide letter dated 28.8.2006. The delay between 16.8.2006 and 28.8.2006 has been explained by the sponsoring authority stating that 19th, 20th, 26th and 27th August, 2006 were holidays. Even if the holidays as stated in paragraph 11 of the reply affidavit filed by the sponsoring authority are treated as justifiable explanation still the delay between 16th and 19th and thereafter from 20th to 26th August remained unexplained. From the affidavits

filed by both these authorities we do not find any satisfactory explanation offered by them. It further appears that parawise comments of the sponsoring authority were received on 29.8.2006. The concerned Assistant prepared a note on 31.8.2006 and submitted the file for further action. The Under Secretary made endorsement on 8.9.2006 and forwarded the file to the Deputy Secretary. The delay between 31.8.2006 and 8.9.2006 has been explained by the detaining authority stating that there were holidays on 3.9.2006 and 6.9.2006 which in our opinion is absolutely insufficient explanation for the delay caused during this period. The Deputy Secretary thereafter made an endorsement on 11.9.2006 and forwarded the file to the detaining authority on 12.9.2006. The detaining authority after having considered the said representation rejected the same vide its order dated 19.9.2006. The delay between 12.9.2006 and 19.9.2006 was explained stating that on 17.9.2006 there was holiday and that the detaining authority was held up in hearing of ten externment appeals. This explanation itself show the callous attitude of the detaining authority towards the detention matters wherein the liberty of a person is involved. The detaining authority ought to have given top priority to this matter and not to the externment matters. Such explanation deserved to rejected outright. Even

further delay between 19.9.2006 and 25.9.2006, when the detenu was served with the order of rejection of his representation, issued on 22.9.2006, in our opinion, has not been explained in the reply affidavits. Thus the delay caused at every stage cannot be overlooked where the liberty of a citizen guaranteed under Article 21 of the Constitution is involved.

9. The Supreme Court in **Rajammal's** case was considering the similar ground of challenge wherein there was delay of only 5 days. This delay was explained by merely stating that the Minister was on tour and hence he could pass the order only on 14.2.1998. The explanation for the delay from 9.2.1998 to 14.2.1998 was held to be unjustifiable and on this ground the Supreme Court allowed the appeal and set aside the order of detention. The relevant paragraph 9 in the judgment of the Supreme Court reads thus:

> "9. What happened in this case was that the Government which received remarks from different authorities submitted the relevant files before the Under-Secretary for processing it on the next day. The Under-Secretary forwarded it to the Deputy Secretary on the next working day. Thus there is some explanation for the delay till 9.2.1998. Thereafter the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only on 14.2.1998. Though there is

> explanation for the delay till 9.2.1998, we are unable to find out any explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14.2.1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. Absence of the Minister at the Headquarters is not sufficient to justify the delay; since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen."

10. In **Rama Dhondu Borade's** case the Supreme Court while rejecting the explanation offered for the delay between 27.10.1998 to 31.10.1998 made very useful observations in paragraphs 20 and 21 of this judgment. The relevant observations read thus:

> "20. The detenu has an independent constitutional right to make his representation under Article 22(5) of the Constitution. Correspondingly, there is a constitutional mandate commanding the concerned authority to whom the detenu forwards his representation questioning the correctness be the detention order clamped upon him and requesting for his release to consider the said representation within the reasonable dispatch and to dispose the same as expeditiously as possible. This constitutional requirement must be satisfied with respect but if this constitutional imperative is observed in breach, it would amount to negation of the constitutional obligation rendering the continued detention constitutionally impermissible and illegal, since such a breach would defeat the very concept of liberty - the highly cherished right - which is enshrined in Art.21 of the Constitution.
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> 21. .... The use of the words "as soon

> as may be" occurring in Art.22(5) of the Constitution reflect that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. What is reasonable dispatch depends on the facts and circumstances of each case and no hard and fast rule can be laid down in that regard. However, in case the gap between the receipt of the representation and its consideration by the authority is so unreasonably long and the explanation offered by the authority is so unsatisfactory, such delay could vitiate the order of detention".

11. In yet another judgment in **Mohinuddin Alias Moin Master's** case the Supreme Court while holding that in view of the wholly unexplained and unduly long delay in disposal of the representation by the State Government the further detention of the detenu must be held illegal and accordingly set aside the order of detention. While so doing the Supreme Court in paragraph 6 made the following observations:

> "6. .... The affidavit reveals that there were two representations made by the appellant, one to the Chief Minister dated September 22, 1986 and the other to the Advisory Board dated October 6, 1986. While the Advisory Board acted with commendable despatch in considering the same as its meeting held on October 8, 1986 and forwarded its report together with the materials on October 13, 1986 there was utter callousness on the part of the State Government to deal with the other representation addressed to the Chief Minister. It was not till November 17, 1986 that the Chief Minister condescended to have a look at the representation. When the life and liberty of a citizen is involved, it is expected that the government will ensure that the constitutional safeguards embodied in Article 22(5) are strictly observed. We say

> and we think it necessary to repeat that the gravity of the evil of the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty by the Constitution and the laws. The history of personal liberty is largely the history of insistence on observance of the procedural safeguards."

12. In **Meena Jayendra Thakur's** case (supra) the Supreme Court was considering somewhat similar case where the right of a detenu to make representation was held to be most valuable right conferred upon him by Article 22 of the Constitution and it was observed that if there was any infringement of such right then certainly the detenu was held to be entitled to be released forthwith. In that case the legality of the order of detention as well as continued detention was under challenge. By the time the order of High Court was carried to the Supreme Court the period of detention had already been completed, still the Supreme Court considered the challenge in view of the proceedings under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. The relevant observations made by the Supreme Court in paragraph 8 and 10 reads thus:

> "8. ... .Under the constitutional scheme engrafted in Article 22, no law providing for preventing detention can authorise the detention of a person for a longer period than three months unless the Advisory Board reports before the expiration of the said period of three months that there is, in its opinion, sufficient cause for such

detention. When an authority issues a declaration under section 9(1) of the Act, the said authority has the necessary powers to revoke the declaration on a representation being made by the detenu against such declaration. Consequently, if the detenu is not intimated on his right to make a representation to the authority issuing the declaration under section 9(1) then certainly his valuable constitutional right gets infringed."

....

"10.... .... the authority issuing a declaration under section 9 of the COFEPOSA Act must intimate the detenu that he has the right of opportunity to represent to the declaring authority and non-intimation of the same infringes upon the constitutional right of the detenu to make a representation under Article 22(5) and, therefore, the notification issued under section 9(1) becomes invalid and the continued detention pursuant to such declaration and the opinion of the Advisory Board within the extended period as well as the confirmation by the State Government are vitiated. But the further question that requires to be answered is whether the initial order of detention issued under section 3(1) of the COFEPOSA Act can be held to be ab initio void on the aforesaid infraction of the right of the detenu. On this question, we are unable to agree with the submission of Mr.Kotwal, inasmuch as Article 22(4) itself provides for a law for preventive detention authorising detention up to a period of three months. The infraction of the constitutional right to make a representation or the opinion of the Advisory Board and the order of detention not being made within the period prescribed under law does not get into the satisfaction of the detaining authority while making an order of detention under section 3(1) of the COFEPOSA Act. If the detaining authority on the basis of the materials before him did arrive at his satisfaction with regard to the necessity for passing an order of detention and the order is passed thereafter, the same cannot be held to be void because of a subsequent infraction of the detenu's right or of non-compliance with the procedure prescribed under law. On such

> infraction and for non-compliance with the procedure prescribed under law, the further detention becomes illegal. But it does not affect the validity of the order of detention itself issued under section 3(1) of the Act by the detaining authority."
>
> (emphasis supplied)

13. It is true, there is no prescribed period either under the provisions of the Constitution of India or under the COFEPOSA Act within which the representation should be dealt with. However, the language employed in Article 22(5) of the Constitution of India, as held by the Supreme Court in **Rama Dhondu Borade's** case (supra), manifestly and very clearly demonstrates that the representation should be expeditiously considered and disposed of with due promptitude and diligence and with a sense of urgency and without avoidable delay. However, if the order of detention cannot be held to be void, a subsequent infraction, namely, wholly unexplained and unduly long delay in disposal of the representation or noncompliance with the procedure prescribed under law within the shortest possible time, the continued detention would vitiate and should be quashed and set aside. In the present case, as observed earlier, the gap between the receipt of the representation and its consideration by the authorities is so unreasonably long and the explanation offered by the authorities is so unsatisfactory, it has, in our opinion, vitiated the

continued detention of the detenu. It is really strange that the concerned authorities should have acted in such a cavalier fashion in dealing with the detenu's representation. We are satisfied that there was failure on the part of the detaining authority to discharge its obligation under Article 22(5) of the Constitution of India. It is very unfortunate that though initial order of detention issued under section 3(1) of the COFEPOSA Act is found to be legal and based on subjective satisfaction, we are constrained to set aside further detention of the detenu on the ground of noncompliance of the procedure prescribed under the law within the shortest possible time and for want of justified explanation for delay. All the concerned authorities are expected to dispose of a representation with due promptitude and diligence and with sense of urgency and without avoidable delay, more particularly where life and liberty of a citizen is involved. The detaining authority, in the present case, in absolutely casual manner completely ignored the constitutional safeguards embodied in Article 22(5) and has simply stated that it could not consider the representation urgently stating that it was busy in hearing ten externment appeals. In the circumstances, we set aside the continued detention of the detenu holding that only the initial order of detention issued under section 3(1) of the COFEPOSA

Act is legal.

14. In the result, the petition partly succeeds. The continued detention of the detenu is quashed and set aside. The detenu is directed to be released forthwith, if not wanted in connection with any other case.

(Smt.Ranjana Desai, J.)

(D.B.Bhosale, J.)

HIGH COURT
CRIMINAL APPELLATE SIDE

CRI.WRIT PETITION NO.1667 OF 2006

Date of Judgment:11.4.2007

For approval and signature

THE HON'BLE SMT.JUSTICE RANJANA DESAI :

THE HON'BLE MR.JUSTICE D.B.BHOSALE :

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?